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BUILDING DEMOCRACY AFTER DICTATORSHIP – A CASE STUDY OF CONSTITUTIONAL DESIGN IN POST-JAMMEH GAMBIA

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1 Introduction

The Gambia, like many post authoritarian African states destroyed by misrule and dictatorship, has embarked on building a new constitution as a democratising effort to cleanse former President Jammeh's dictatorship. The grand aim is to usher in a new political and constitutional dispensation based on democratic rule, respect for human rights and accountability for past abuses. Constitution building introduced in this manner is more often than not inspired by (r)evolutionary forces. In such circumstances, constitutional design experiments are done as part of national unity-building strategies and are thus, heavily informed by the need to correct past painful experiences of human rights abuses, misrule, and other forms of injustices. This ambition is well articulated in The Gambia's Draft Constitution, which was submitted to the National Assembly in June 2020. By the time of writing this chapter, the Draft Constitution had stipulation which states that 'the new constitution is a beacon of hope, stability and national unity, progress, peace and prosperity'.¹ Yet, designing a new constitution in a post dictatorial state replete with mass human rights abuses and weak public institutions is a daunting task since the imperatives of a consensus constitution that ensures no return to break down of the rule of law and abuse of human rights are critical.

Some say that this is what Gambia experienced in the last 22 years in which misrule of former President Jammeh, entrenched dictatorship and militarised politics.² After his much-desired departure, the new

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1 Constitutional Review Commission 'Proposed draft constitution of the Republic of The Gambia' (2019) 1 <https://crc220.org/wp-content/uploads/2015/12/crc-draft-constitution.pdf> (accessed 3 January 2020).

2 M Jobarteh 'From dictatorship to a new constitution in The Gambia: Issues and concerns' (2018) <http://constitutionnet.org/news/dictatorship-new-constitution-gambia-issues-and-concerns> (accessed 25 June 2020). His 22-year rule commenced on 22 July 1994 and terminated in January 2017, when his term officially ended.

government set about to develop a people's driven constitution. Given the influence of historical legacy under which a new constitution is to be developed, the process of building a new constitution is also a test as to whether the state of The Gambia can recover from its dark past and entrench constitutional democracy, rule of law and respect for human rights and fundamental freedoms. The process and substance of the new Constitution must therefore embrace popular input and endorsement. Whenever used in this chapter, *constitution building* refers to

the processes of negotiating, drafting and implementing constitutions and implies building new structures or re-developing existing ones, enhancing or adding value to governance and the political system

whereas *constitution-making* means drafting and promulgation of a constitutional text.³

The chapter examines what characterises Gambia's post authoritarian constitution building and analyses the question of what the best form of post authoritarian constitution is. Through a detailed and analytical review of secondary sources, literature, laws and statutes, the chapter commences by providing a historical context to The Gambia's constitution building efforts. It then frames post authoritarian constitutional design by highlighting political and institutional forces behind constitution building in The Gambia. Section three focuses on methods and principles of participatory constitution building in terms of processes enshrined under the Constitutional Review Commission Act, 2017 (CRC Act) against international normative frameworks. The fourth section analyses challenges bedevilling constitutional design in post authoritarian Gambia, in particular challenges faced by the Constitutional Review Commission (Commission) in coming up with a new constitution. The chapter concludes by recasting the main strands of participatory constitution building that promotes ownership of the resultant constitution and guarantee constitutional democracy and the rule of law.

2 Framing Gambia's post authoritarian constitution building

The palpable narrative associated with The Gambia's constitution building is that it is a process, the aim of which, among others, is to cleanse the

³ International IDEA 'Constitution building after conflict: External support to a sovereign process' (2011) 14 <http://www.constitutionnet.org/sites/default/files/2017-06/cb-after-conflict.pdf> (accessed 7 November 2018).

country from bad governance, misrule and corruption.⁴ Seen from that perspective, constitution building of this kind is both revolutionary and evolutionary.⁵ The former is generally introduced after a dictatorial system is ousted or where a mass revolt uproots a government to establish a new constitutional order whereas the latter occurs through cumulative constitutional reforms capable of substantially altering existing order.⁶ For instance, the political contexts that gave rise to constitution building endeavour is revolutionary in nature whereas reforms and institutional strengthening endeavours are evolutionary. One can say therefore that the Gambia's process reveals two strands – revolutionary and evolutionary – as it is both a political tool for democratising the country and a process of strengthening public institutions. It may therefore be argued that constitution building characterised by these two strands must be true to the underpinning ideals and must dispense revamped legal and institutional policy frameworks to aid democracy. And as it has been argued, the new constitutional order should be aimed at 'ending self-perpetuating rule, ensure effective separation of powers and restrain the government in the exercise of its functions'.⁷

Although these two strands have limitations in regard to inclusivity and broad-based participation, challenges of revolutionary constitution building are instructive in post authoritarian state rebuilding process. For example, its inherent vulnerability to afford 'victors' unprecedented voices over 'losers' risks exclusion of those perceived to support the collapsed regime or are sympathetic with its policies. Post authoritarian Gambia presents this dilemma where the waves of democratisation are being driven by political opposition forces who ascended into power after winning elections under the banner of opposition alliance, the Coalition 2016. Evidently, one can say that the constitutional design in The Gambia is characterised by two factors; namely the political forces championing democratic reforms, rule of law and human rights; and the legal frameworks – both the CRC Act and the country's Constitution of 1997 as amended guiding constitutional crafting process. These two

4 See generally Jobarteh (n 2).

5 See generally D Richards 'Comparative revolutionary constitutionalism: A research agenda for comparative law' (1993) 26 *New York University Journal of International Law and Policy* 1.

6 See generally P Dann & Z Al-Ali 'The internationalized *pouvoir constituant* – Constitution-making under external influence in Iraq, Sudan and East Timor' (2006) 10 *Max Planck Yearbook of United Nations Law* 424. These theories are discussed in detailed in chapter two of my LLD thesis entitled 'Foreign influence and the legitimacy of constitution building in South Sudan' Centre for Human Rights, University of Pretoria, 2021.

7 As above.

factors inevitably shaped not only the process but also the final text of the Draft Constitution. I provide some analyses of these factors below.

2.1 Political forces and agitation for a new constitutional order

Inasmuch as the quest for new constitutional order is led by the new political forces of The Gambia, agitation for change of government and return to democracy is longstanding. The desire for new constitutional framework of governance has been ‘on the minds of The Gambians’ for a foreseeable past.⁸ The argument is that the ‘multiple amendments to the 1997 Constitution accompanied by undemocratic provisions’ only worked to provoke demands for a new constitution other than preserving the ‘Jammeh Constitution’, which is seen as a relic of authoritarianism.⁹ When elections were held, Jemneh competed, lost and conceded defeat in favour of a coalition candidate, Adama Barrow, but only momentarily before changing his mind. The brief change of heart by Jemneh in reversing an earlier concession to Adama Barrow lasted until military threats from the Economic Community of Western African States (ECOWAS) forced him out of power and he subsequently fled the country. Other than domestic political forces and ECOWAS’ intervention, the collective engagement by the people of The Gambia in demanding constitutional rule based on a new constitution has reinforced the need for a fresh political start.

After the authoritarian regime of long-time former President Jemneh, who was voted out, the United Democratic Party (UDP)¹⁰ – the coalition of seven political forces that won the elections – sought to introduce a new constitution as part of their promise to ensure democracy and rule of law.¹¹ However, as stated earlier, the agitation long hardened when Jemneh’s regime and his party the Alliance for Patriotic Reorientation and Construction (APRC) introduced several amendments to the 1997 Gambia Constitution.¹² Suffice to note that the 1997 Constitution introduced in the backdrop of the 1994 Constitution which also resulted

8 S Nabaneh ‘New Gambia and the remaking of the constitution’ (2017) <http://constitutionnet.org/news/new-gambia-and-remaking-constitution> (accessed 6 August 2019).

9 Jobarteh (n 2).

10 The UDP is one of the parties that formed the Coalition 2016, an umbrella party of seven political parties headed by Adama Barrow who went ahead to challenge and won presidential election of 2017.

11 Adama Barrow and his political party had pledged during his election campaign appoint Constitutional Review Commission to draft new constitution.

12 Nabaneh (n 8).

from the *coup d'état*,¹³ did very little to prevent the democratic void created by the military government of Jammeh. Instead, the constitutional amendments introduced by Jammeh's government only consolidated his grip on political power backed by military force. This led to the erosion of democratic ideals then existed under the 1997 Constitution and reinforced the need for a new constitution.¹⁴

2.2 Gambia's legal frameworks for and institutions of constitution building

2.2.1 The legal regime on constitutional design

Alongside constitutional amendment processes in the 1997 Constitution, parliament enacted the CRC Act to guide the design and adoption of a new constitution. Recognising that constitution building is a complex technical and political process often requiring resource, expertise and above all political will, the CRC Act established the Commission and mandated it to 'draft and guide the process of promulgating a new constitution for The Gambia'.¹⁵ It effectively empowers the Commission with adequate operational space and institutional independence to steer and deliver a constitution that is acceptable to all the Gambians.¹⁶

That broad mandate requires the Commission to work with all Gambians and stakeholders in adopting the new constitution. The Gambia's constitution building process is required to promote respect for national values and ethos as well as promotion of 'democratic values and respect for and promotion of the rule of law and fundamental rights and freedoms'.¹⁷ Whilst the CRC Act directs the Commission to review the 1997 Constitution, it commands it to preserve certain fundamental tenets such as the doctrine of separation of powers, sovereignty or territorial integrity, national unity and peaceful cohesion and to preserve the principle of periodic democratic elections.¹⁸ Suffice to mention that Gambia also ratified a number of international and regional treaties that

13 Lawhub 'History of constitution building in The Gambia' <https://www.lawhubgambia.com/constitution-building> (accessed 8 August 2019).

14 B Drammeh 'How many amendments has the 1997 Constitution of The Gambia undergone since it came into force?' (2017) <http://fatunetwork.net/many-amendments-1997-constitution-gambia-undergone-since-came-force/> (accessed 10 August 2019).

15 See Preamble to the CRC Act, 2017.

16 Sections 6 & 7 of the CRC Act, 2017.

17 Section 6(ii) of the CRC Act.

18 Section 6 of the CRC Act.

bind it to adopt a constitutional democracy in tandem with the spirit underpinning such treaties, conventions and covenants.

2.2.2 Institutions of constitution building

The making of a new constitution in The Gambia is led by the Constitutional Review Commission, its mandate being to ‘seek public views on the new constitution whilst promoting national unity, social cohesion and peace’¹⁹ amongst ordinary Gambians and its political forces. The CRC Act enjoins the Commission to follow certain processes and work with actors or stakeholders in the making of a constitution. In exercising this mandate, the Commission solicited views by way of submissions from individuals ‘including representatives of professional, civic, political and other organisations’.²⁰ Although the CRC Act predominantly empowers the Commission and its constituent elements – the Technical Committee and the Secretariat – political institutions, faith-based groups, civil society organisations and community leaders also formed part of institutions or actors engaged in constitution building in the Gambia.

In keeping with its mandate, the Commission embarked on a robust, transparent, and inclusive process of soliciting opinions from Gambians and stakeholders with interests in constitutionalism. Through what it calls ‘issues documents’, the Commission developed a list of questions on certain pre-identified issues of constitutional importance notably on governance, constitution, foreign relations and resource mobilisation and management.²¹ Cumulatively, a total of 369 issues were presented and public views obtained – effectively representing major public consultation in a country recovering from dictatorship and divisive politics. This participatory and inclusive process is expected to contribute to a sense of public ownership of the constitution. The process need not only be led by the Commission and guided by the CRC Act, but it also needs to follow international principles and methods of participatory constitution building as discussed in the section below.

¹⁹ Section 6(2)(a) & (iv) of the CRC Act, providing for the establishment of a Constitutional Review Commission to draft and guide the process of promulgating a new Constitution for The Gambia and for connected matters.

²⁰ Section 6(4) of the CRC Act.

²¹ Constitutional Review Commission ‘Possible areas for constitutional reform’ (2018) 1-43 <http://197.231.128.20/crc/wp-content/uploads/2015/12/CRC-Issues-Document-October-2018.pdf> (accessed 24 January 2020).

3 International principles and methods of participatory constitution building

3.1 Principles of public participation

Public participation in constitutional design is inseparably intertwined with democracy and good governance since ‘modern constitutionalism is based on representation and protection of rights’.²² Popular participation is not only applicable during the constitutional design phase but also in its implementation to ensure that the government is held accountable to the bargains of the populace. In post dictatorial circumstances, public participation is arguably an effective tool the elites could use to build and consolidate public trust in the institutions of the state. Despite widespread acknowledgement of the role of popular participation in the constitution building process,²³ Partlett argues that post dictatorial regimes can entrench an ‘authoritarian constitution’ which charismatic political elites can use to pervert settled constitutional rules and conventions.²⁴ To avoid building a sham constitution,²⁵ the process must be inclusive, participatory, and transparent so as to gain public acceptance as a truly legitimate framework of governance.

Since constitutions are made in an ‘exceptional moment of popular mobilisation in which the monolithic mass directly creates a new constitutional order’, the extent to which the process is inclusive, transparent and voluntary is consequential to its legitimacy.²⁶ It can also ‘lead to peace and development if it succeeds to unify the country and

22 E Bulmer ‘What is a constitution? Principles and concepts’ (2017) 12 <https://www.idea.int/sites/default/files/publications/what-is-a-constitution-primer.pdf> (accessed 6 August 2019), outlining theoretical premise of a constitution and principles that guide its design.

23 See generally A Banks ‘Expanding participation in constitution building: Challenges and opportunities’ (2008) 49 *William & Mary Law Review* 1043; T Ginsburg, Z Elkins & J Blount ‘Does the process of constitution building matter?’ (2009) 5 *Annual Review of Law and Social Science* 201; JN Wanki ‘The value of participation and legitimacy in the constitution building processes of post-independence Cameroon and post-apartheid South Africa’ (2017) 50 *The Comparative and International Law Journal of Southern Africa* 109.

24 W Partlett ‘The dangers of popular constitution building’ (2012) 38 *Brook Journal of Internal Law* 196.

25 See D Law & M Versteeg ‘Sham constitutions’ (2013) 101 *California Law Review* 880, stating that a constitution is classified as a sham if its provisions are not upheld in practice.

26 Partlett (n 24) 198.

entrench commonly cherished values'.²⁷ It is contended that popular participation could contribute to strengthening the power of citizens against undemocratic incursions into a constitutional order so established. Intrusions could take various forms, including in the form of state capture or corporatism where the corporates 'capture' state decision-making processes to their advantage.²⁸ It is also acknowledged that popular participation is aided by how secure and peaceful the environment is for the citizens' active engagement.²⁹

The transition to democracy in post dictatorial states requires careful consideration of the process involved in building democracy and a reality-check of previous systems sought to be dismantled and replaced with democratic governance. The caution is necessitated by the fact that democracy itself requires open-mindedness to diverse opinions and perspectives. There must be no disregard to any dissent regardless of its impact on national unity as such would be incompatible with democratic tenets of inclusivity, transparency and free speech. Where the transition to democracy is influenced and or financed externally, more caution is required so that indigenous voices are not sidelined. The following sections unpack these principles in detail as provided in the Act establishing the Commission and as also widely recognised as consequential to building stable constitutional democracy. Brandt and others have outlined various principles of participatory constitution building as 'political will enabling consensus, strategic planning including adequate resources, transparency and accountability'.³⁰ The next section explains the extent to which these principles have been followed in the Gambia's constitution building process.

27 United Nations Development Programme 'Guidance note on constitution building support' (2014) 5 https://www.un.org/ruleoflaw/files/Guidance_Note_United_Nations_Assistance_to_Constitution_building_Processes_FINAL.pdf (accessed 8 August 2019).

28 CS Nino 'Transition to democracy, corporatism and presidentialism with special reference to Latin America' in in D Greenberg et al (eds) *Constitutionalism & democracy: Transitions in the contemporary world* (1993) 46, 52.

29 J Gluck & M Brandt 'Participatory and inclusive constitution making: Giving voice to the demands of citizens in the wake of the Arab spring' (2015) 11 <https://www.files.ethz.ch/isn/188062/PW105-Participatory-and-Inclusive-Constitutionbuilding.pdf> (accessed 18 August 2019).

30 M Brandt et al *Constitution building and reform: Options for the process* (2011) 120 https://www.interpeace.org/wp-content/uploads/2011/09/2011_11_Constitution-Making_Handbook_English.pdf (accessed 5 August 2019).

3.1.1 *Inclusivity of the country's diversities*

A key aspect of participatory constitutionalism is that its design and resultant executory mechanisms recognise and apply inclusivity. When used in this section, inclusivity refers to mechanisms for providing equal opportunities to the country's ethnic, linguistic, and political diversities to participate in the constitution building processes.³¹ As revealed earlier, the new Constitution is being adopted at the backdrop of political tensions arising from elections that ended the dictatorship in the country. In particular, ethnic diversity and political divisions between supporters of former President Jammeh and those of the new regime necessitate building an all-inclusive Gambian state and constitutional framework. It is incumbent upon constitution-makers and political elites to ensure that the new Constitution is not designed just to address the aspirations of their supporters but all Gambians including minority groups, women, persons with disabilities and other people with special needs. There can be no popular participation without inclusion as such would be deemed tokenistic. Even in constitutional reforms that make major political alterations, 'success depends on the extent of public participation and support received from all sectors of the society'.³²

A constitution building process is considered 'participatory if the masses have more opportunities by which to both oversee and engage in the design process'.³³ Notwithstanding limitations to inclusion, constitutional design processes should seek to provide opportunity for all segments of the society to participate, without discriminating against any group. This is in acknowledgment of the fact that inclusion can contribute to enhancing transition to democracy especially in post authoritarian contexts where exclusion and discrimination often characterise political society. A constitution which has as its mandate nation building, peace and national unity – such as The Gambia's – should ensure that all segments of its population are adequately represented. Short of that, that nation could lose the chance to extract itself from chaos, disunity or fragmentation. Inclusion is thus an enriching component of constitutional legitimacy. Public participation in constitution building could also promote rule of

31 W Waihu 'A practical guide to constitution building: An introduction' (2011) <https://www.idea.int/sites/default/files/publications/chapters/practical-guide-to-constitution-building/a-practical-guide-to-constitution-building-chapter-1.pdf> (accessed 10 July 2021).

32 Office of the United Nations High Commissioner for Human Rights (OHCHR) 'Human rights and constitution making' (2018) 14 https://www.ohchr.org/Documents/Publications/ConstitutionMaking_EN.pdf (accessed 6 August 2019).

33 T Ginsburg, J Blount & Z Elkins 'The citizen as founder: Public participation in constitutional approval' (2008) 81 *Temple Law Review* 363.

law and good governance. In recognition of the inherent and instrumental values of public participation, the Act establishing the Commission directs it to:³⁴

[A]fford the people of The Gambia, both within and outside the country an opportunity to freely express their opinions and make suggestions on matters they feel should be considered in the Constitution [such as] inviting persons, including representatives of professional, civic, political and other organisations, to appear before the Commission to make presentation.

Based on this, the Commission carried out consultations in the diaspora to ‘allow those in the diaspora to participate and ensure that their views regarding the new constitution are considered’.³⁵ Similarly, it conducted various civic consultations in all communities and translated the draft document into several national languages to give access to Gambians who may not be literate in foreign languages. Derived from CRC Act provision is the recognition that a constitution must belong to all the citizens of the country to whom it applies. That the sense of ownership partly emanates from inclusivity and meaningful participation or engagement of the populace in the constitutional design so as to make a country a ‘common possession of all the citizens, not sections of the society’.³⁶ Similarly, the view that constitutions are ‘endogenous – or outcomes of a deeper social process that are outside the control of constitution-makers’ should motivate popular and inclusive engagement of citizens in its design.³⁷ Meaningful citizens inclusion is dependent on the extent of voluntariness of citizens’ participation so as to truly ‘penetrate more deeply’ into consolidating democracy.³⁸ Ensuring inclusivity in constitution building raises two issues: the contradiction between the ‘victors and losers’ thus creating a tendency of ‘us’ versus ‘them’ and how to ensure special measures are put in place to engage the most vulnerable thus guaranteeing that they are not further left behind.

34 Section 6(3) & (4) of the CRC Act.

35 T Isbel & S Jaw ‘The Gambia’s draft Constitution reflects citizens’ preference for term limits, gender quota’ (2020) 1 https://afrobarometer.org/sites/default/files/publications/Dépêches/ab_r7_dispatchno338_gambias_draft_constitution_reflects_citizen_preferences.pdf (accessed 26 July 2020).

36 Bulmer (n 22) 14.

37 R Dixon & E Posner ‘The limits of constitutional convergence’ (2011) 2 *Chicago Journal of Internal law* 408.

38 Ginsburg, Blount & Elkins (n 33) 364.

The 'us' versus 'them' tendency

When dictatorship falls, the immediate tendency is to dismantle institutions, systems and operational platforms on which the previous government operated. It is argued that such is accompanied by a belief that in order to usher in a new constitutional order veiled in the statue of democracy, the previous establishments must be dismantled, disbanded and shamed. Whilst that may be the right course for the victors (the people who championed change), there is a danger that those in the previous system could be excluded all together, hence triggering a chain of chaos where those excluded in the new dispensation are on constant trajectory to resist or at worst, dismantle the newly introduced system. They may do so not because the new system is necessarily worse but to fight for their right to be included and not be labelled as collectively guilty of the past events.

To address this contradiction, the constitution building process should, as much as possible, be inclusive of all peoples including supporters of the previous regime.³⁹ To escape constitutional design becoming a mere experiment lacking in inclusivity, popular participation of citizens in its making must be guaranteed because it does not only promote popular reception of new norms, it also enhances a sense of positive change and a break from the dark past. Accordingly, constitution building after the departure of a dictator, or an overthrow of autocratic government should not be solely driven by political forces opposed to the previous regime. Exclusion of any specified group risks undermining the legitimacy of the new constitution and a potential return to *status quo ante*, with different faces of power. It should be noted that the situation in The Gambia is plausible in relation to inclusivity because the establishment of a relatively independent commission to steer the making of the Constitution, rather than leaving it solely to the political institutions assured broad-based participation.

The dictatorial rule of Jammeh in The Gambia ruined democracy and good governance, and his departure presents an opportunity to build the country anew and entrench democracy, rule of law and human rights. Such could not be achieved without designing a popularly accepted constitution that ensures all sections of the society are included in its design and implementation. Linked to the divisive dichotomy of us versus them, there is a potential for polarisation in the event that there is no consensus, and no meaningful efforts are taken to 'build bridges' along the divides including the risk of toxic ethnocentric politics.⁴⁰

39 Jobarteh (n 2).

40 Gluck & Brandt (n 29) 15.

Securing the rights of minorities, women and youth

One of the aims in building a new constitution is entrenchment of human rights and fundamental freedoms which become even more apparent in post authoritarian constitutional design contexts. In particular, attention should also be paid to securing the rights of minorities, women and youth who may have suffered the brunt of dictatorial rule but are likely to be forgotten in the political debates of a new constitutional dispensation. As proclaimed in the Preamble and detailed in section 17(1) of the 1997 Constitution, fundamental rights and freedoms are constitutionally guaranteed and protected for all without any distinction whatsoever.⁴¹ Equality to participate in civic affairs such as constitution building is a right accorded to every 'Gambian of full age and capacity',⁴² under the 1997 Constitution. It follows therefore that, in making a new constitution, efforts must be had to ensure an inclusive process. In most societies, minorities, women, and youth fall far behind the political power centre where decisions are made. In The Gambia, the elaborate process of consultation and civic engagement can be a catalyst for engaging vulnerable groups. However, the means by which consultations are conducted is as important as the end product of those consultations.

3.1.2 Voluntariness and transparency

Those willing to engage must be allowed to self-consciously take part in the debates, compromise and decisions impacting fundamental aspects of the constitution. Rules of democracy also require that people directly participate in governance. One way to do so is to set the super rules of polity and governance of the society through constitutional design. Democracy requires freedom to participate or not to participate in public affairs. Building democracy in post dictatorial states requires as many eligible citizens as possible to participate, however, negotiation or bargaining is best led by or occurs between national elites in collaboration with foreign actors. Such participation must be voluntary, if it is to increase constitutional legitimacy and underpin a new social contract necessary for it to command public obedience. As one scholar stated, 'constitutions are [devices] of organised power'⁴³ which cannot be imposed, few exceptions notwithstanding.

41 S Nabaneh 'Country report: The 1997 Constitution of The Gambia' (2015) 4 http://www.icla.up.ac.za/images/country_reports/gambia_country_report.pdf (accessed 6 August 2019).

42 Nabaneh (n 41) 13.

43 H Okoth-Ogendo 'Constitutions without constitutionalism: Reflections on an African political paradox' in D Greenberg et al (eds) *Constitutionalism and democracy: Transitions in the contemporary world* (1993) 67.

Transparency can enhance trust and confidence of citizens in the elites running the government on their behalf and ‘it is also a valuable tool for managing public expectations and protecting the integrity of the constitution building process’.⁴⁴ Drawing from constitution building experiences following the Arab Spring, transparent public participation is said to strengthen the social compact and allows media to monitor deviations and report on them, hence increasing accountability.⁴⁵ No constitution can achieve near universal approval in every detail of it but the litmus test for popular reception of any new constitution is the extent of transparency of the process of negotiation, drafting and adoption. The people of Iceland recognised the importance of popular participation and in particular, ‘transparency and openness’ in their constitution building process.⁴⁶

3.2 Methods of ensuring public participation in constitution building

Multiple methods for engaging the public in constitution building exist. Popular amongst these are civic consultation and education, referendum, and ratification of the final constitutional text. In the case of The Gambia’s constitution building, the Act enjoins the constitution crafting body to ensure adequate consultation with the people including those in diaspora. In addition, the process for constitutional change under the 1997 Constitution requires a referendum for changes affecting certain provisions.⁴⁷ One can say that a referendum is expected to happen given the fact that the Draft Constitution, 2020 affects these provisions as it is one of the main validating processes for the new constitution.

3.2.1 Civic consultations and awareness

The Gambia’s constitution building could be a modern test case of a truly participatory post dictatorial constitution building initiative. As stated earlier, the Commission conducted consultations and invited submissions from across the society and stakeholders. Perhaps, as a dividend of such a rich public participation in constitutional design, the proposed Constitution of The Gambia represents a departure from an elites-

44 Gluck & Brandt (n 29 above) 13.

45 As above.

46 A Hudson ‘Does public participation really matter? The case of Iceland’s crowdsourced constitution’ (2017) 2 <https://www.oidp.net/docs/repo/doc409.pdf> (accessed 5 August 2020).

47 See secs 26(3) & (4)(d) of the 1997 Constitution, concerning alteration of the Constitution.

controlled constitution to a truly popular constitution building process. Evidently, the adoption of a devolved system of government so as to take power 'closer to the local people and communities'⁴⁸ is one example of such dividends. But public views on constitutional design must be relevant to the extent that the Commission 'considers appropriate'⁴⁹ for such to find its way into the Draft Constitution.

Public consultations can take various shapes, including community meetings, submissions, conferences, and interviews with experts. The advent of social media has increased platforms available to consult with a wide array of constituencies and it has also reduced costs of consultations. However, public consultation should ensure 'full participation' as such it truly carries the weight of legitimising the resultant constitution, as opposed to the tokenistic, isolated and/or controlled participation.⁵⁰ Examples of robust public engagement and consultation strategies in constitution making processes include that of Iceland in recent times and Uganda's in the late 1980s and 90s.⁵¹ It is contended that genuine constitution building processes should ensure consideration of the principles of participation discussed above. Regardless of the entity that leads the process, both legal and normative justifications for public participation as stipulated under articles 25 of the ICCPR and 21 of the UN Declaration of Human Rights be observed.⁵²

3.2.2 Constitutional referenda and ratification

Constitutional referenda are increasingly becoming a device for enhancing legitimacy and popular welcoming of a new constitutional order. Citizens can get involved in many ways including determining the composition of the referendum commission or their collective voice in approving or disapproving certain constitutional order.⁵³ At times, they do this by

48 Constitutional Review Commission 'Explanatory memorandum to the proposed draft constitution' (2019) 2 <https://crc220.org/wp-content/uploads/2015/12/explanatory-memorandum.pdf> (accessed 28 December 2019).

49 Section 6(2)(a) of the CRC Act.

50 A Saati 'Public participation in constitution building processes: What does it mean?' (2012) 4 <https://pdfs.semanticscholar.org/90e4/0198546ade3318f9e36e51d653bdef5bbfa9.pdf> (accessed 9 August 2019).

51 See generally Hudson (n 46).

52 A Saati 'Participatory constitution-making as a transnational legal norm: Why does it "stick" in some contexts and not in others?' (2017) 2 *UC Irvine Journal of International Transitional and Comparative Law* 113 at 116 & 121.

53 M Böckenförde 'Letting the constituent power decide? Merits and challenges of referenda in constitution making processes in Africa' in T Abbiate (eds) *Public participation in African constitutionalism* (2018) 27.

demanding that commissioners be vetted publicly so that citizens can have their say. Elites may find referendums a useful strategy to galvanise political support towards their strategic goals. Crucially, constitutional referendum are platforms for validating political decisions on political governance and can promote accountability by the citizens.⁵⁴ Acknowledging earlier assertions by Kirkby, Murray and Tushnet, Böckenförde asserts that approval of constitutions through referendum is regarded as a good practice in modern constitutionalism.⁵⁵ Since post authoritarian reforms have to mend broken social and political relationships, the use of referendum as a means to adopt a constitution should be approached with a lot of care. Voting could easily align with popular narratives along political divide of those who support the old regime versus those who cherish the new dispensation.

At times, a political ratification through a constituent assembly may be pursued. As the citizens' interest in governance increases, concerns about public involvement is increasingly gaining universal rule status. Elites and constitution-makers see public participation in constitution building as necessary to legitimise the constitution. It is also a way of building consensus and popular input as a form of direct democracy. Ratification of constitutional text invites a specially elected constituent assembly to deliberate and adopt a final constitution as opposed to the legislative arm of government.⁵⁶ Considering that The Gambia started broad-based consultations of citizens, political parties and other stakeholders, the holding of a constitutional referendum which is mandatory adds another layer of public participation.

4 Assessing the Gambian process: Challenges encountered in post authoritarian constitution building

The rebuilding of democracy and good governance in contexts of post authoritarianism faces a multitude of challenges. Firstly, to ensure that the rebuilding is inclusive and participatory, engagement of the people is paramount, yet such undertaking could be costly and time consuming. In The Gambian case, the Commission must ensure that it has adequate

54 SP Ruth, Y Welp & L Whitehead (eds) *Let the people rule? Direct democracy in the twenty-first century* (2017) 31.

55 Ruth, Welp & Whitehead (n 54) 26.

56 C Kirkby & C Murray 'Constitution building in Anglophone Africa: We the people?' in C Ndulo & M Gazibo (eds) *Growing democracy in Africa: Elections, accountable governance, and political economy* (2016) 83; See also AC LeVan, TA Eisenstadt & T Maboudi *Constituents before assembly: Participation, deliberations and representation in the crafting of new constitution* (2017) 25.

funding to reach as many people as possible and to take reasonable time so as to ensure quality public consultation. This, however, seem to have been addressed by the Commission as its report states that:⁵⁷

The Gambia constitution building process undertook a robust mechanism of engaging Gambians at home and in diaspora. Some of the mechanisms adopted for civic engagement include focus group discussions, household surveys, online participation platforms dubbed public participation platform and position papers from expert groups. Accordingly, the Commission adopted a highly participatory and consultative civic engagement approach to solicit views and opinions of Gambians on constitutional issues they wished to see in the proposed new Constitution of The Gambia.

Evidently, such an elaborate process can be ‘expensive and time consuming’.⁵⁸ When one considers the series of civic engagements in the form of workshops, community meetings, conferences, and seminars, it is inevitable that such process cannot be completed in a short period and would attract considerable financial expenses to make it a reality. It would appear that time constraint is dependent on the levels of participation, which could be characterised as false participation, symbolic participation, limited participation, consultative participation, or maximal participation, reflecting the degree and intensity of civic engagement.⁵⁹ Secondly, what is evident from the above passage is that the Gambian process was participatory but it does not necessarily mean that the consultations generated consensus and narrowed sharp divisions and polarisation that often arise in post authoritarian transitions.

It is argued that popular engagement in constitution building could make compromise difficult as no reasonable debate and consensus can take place with a large number of people. Although the Commission has generous time between the preparation of the Draft Constitution and adoption by the National Assembly, enormous time and resources are needed to ensure grassroots are reached and persons with special needs are in particular included. To effectively do this, the Commission needs tools and human resources to reach and engage persons with disabilities, women and all vulnerable groups. The other challenge that the Commission must deal with is how to ensure constitution building promotes peacebuilding

57 Constitutional Review Commission ‘Report of the Constitutional Review Commission on the draft Constitution for the third Republic of The Gambia’ (2020) 30-35 <https://crc220.org/wp-content/uploads/2015/12/CRC-FINAL-REPORT-ON-THE-DRAFT-CONSTITUTION.pdf> (accessed 29 June 2020).

58 Gluck & Brandt (n 29) 15.

59 Saati (n 52) 23-24.

and national unity and that differences do not degenerate into further polarisation or threaten open conflict.

5 Conclusion

This chapter investigates the best form of post authoritarian constitution building process in the Gambia. It proposes that rebuilding constitutionalism in a post authoritarian nation must be characterised by reflection of common aspiration of the peoples, regardless of the divides. The 21 years of The Gambian political history under former President Jemneh may have weakened democracy but the rebuilding of democracy through constitutional crafting could equally cause harm if the process of negotiation, deliberation and adoption of a new constitution is not inclusive, transparent, and voluntary. It follows therefore that the voices of supporters of Patriotic Reorientation and Construction (APRC) and other political forces and groups deemed to have had a role in the previous regime must be considered as stakeholders in rebuilding Gambia's constitutional democracy.

To ensure inclusivity, the Commission, guided by law carried out wider consultations in and outside The Gambia – a process seemingly deemed in compliance with international best practices of participatory constitution building. Accordingly, this chapter contends that the hallmark of any new constitution introduced post authoritarianism should strive to entrench an all-inclusive society where the supporters of former government and those of the new regime feel ownership of the new dispensation. That way, the new constitution does not become vulnerable to unnecessary challenge and rejection by those feeling left out and the cycle of change may not stop. As demonstrated by the foregoing analysis, one can say that the Gambia's new constitutional building process incorporated the internationally recognised processes and has broadly engaged its diversities.

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